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In The Supreme Court of the United States

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

Petitioner,

v.

BERNARD BOGGS, as Administrator of the Estate of HILDA BOGGS, deceased, as Personal Representative of the statutory beneficiaries of a wrongful death claim, and in his own right,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY TO BRIEF IN OPPOSITION

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Camden-Clark Memorial Hospital Corporation ("Camden-Clark") respectfully submits this reply memorandum in support of its petition for writ of certiorari.

INTRODUCTION AND SUMMARY OF REPLY

Camden-Clark submits that the Court should begin its review of Respondent Boggs' Brief ("Resp. Br.") in an unusual spot – the table of authorities. This table of course catalogues all of the cases and authorities upon which Respondent relies. Resp. Br. at vi-vii. It is an illuminating catalogue.

Haslip[1] is missing. *Oberg*[2] goes unmentioned. *Gore*[3] – a watershed case on the subject of due process limits on state power to impose punitive damages – merits not a word. Lastly, *Cooper Industries* and *State Farm*,[4] which established beyond further quibble that due process requires *de novo* appellate review of punitive damages, fail to prompt even one citation.

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[1] *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

[2] *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

[3] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

[4] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

These omissions cannot be inadvertent. Respondent fails to discuss *Haslip*, *Oberg*, *Gore*, *Cooper Industries*, or *State Farm* because there is nothing that he can say about them to his advantage. Instead, Respondent seeks to divert the Court's attention from his indefensible position (i) through rhetoric and jury argument concerning his wife's death, and (ii) by interjecting a handful of supposed procedural and prudential obstacles to granting the writ.

Given their irrelevance to the narrow legal question presented, Camden-Clark will ignore the rhetoric and jury argument. This reply will instead address Respondent's alleged obstacles to consideration of the question presented. These can be refuted readily.

Respondent first contends that the case has become moot because Camden-Clark chose to pay the judgment (cutting off accrual of interest at ten percent), while simultaneously seeking certiorari in this Court. But money paid can be repaid. Camden-Clark has grounds for relief, and it has a legal basis to bring this dispute before this Court. Moreover, Respondent has a simple mechanism to provide relief to Camden-Clark if ordered to do so: payment of money.

Respondent next raises the spectre of an adequate and independent state ground for decision. This supposed ground is no obstacle to certiorari, because the Supreme Court of Appeals of West Virginia – the court that committed the error at issue and the court to which the writ would be

addressed – did not cite or rely on *any* ground. If that Court declined to perform *de novo* appellate review because of some state-law ground, it was bound to say so and identify the ground. It did not.

From there, Respondent posits that there is no "split in the federal circuits" and no "credible claim that an incorrect rule of law was applied." Yet he fails to even *address* the rule of law relied upon in the petition. And of course there is no split in the federal circuits, because the specific purpose of *Cooper Industries* was to *resolve* such a split. Finally, the rule of law now followed by the federal courts of appeals is the one *for which Petitioner advocates here*.[5]

Respondent next asserts that Camden-Clark has not shown that it did not receive the review to which it would be entitled. It has. The appendix to the petition contains the requests for *de novo* review that Camden-Clark made to the Supreme Court of Appeals, and it contains the orders of that Court summarily refusing any review. No more "proof" can be required.

Respondent follows with a related assertion that Camden-Clark was not denied due process *throughout the proceedings*, and probably would not have benefited from "more exacting" *de novo* review. Camden-Clark complains of an essential procedural protection to which it was entitled and denied, and

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[5] Although Camden-Clark elaborates on some of Respondent's contentions *infra*, it will not further elaborate on this one.

whether it winds up benefiting from that review must await the event.[6]

Finally, Respondent worries that this Court's intervention might alter state practices allegedly grounded in the West Virginia Constitution. Indeed it might, but the Framers of both the Supremacy Clause of art. VI, cl. 2, and the Due Process Clause of the Fourteenth Amendment understood and intended that state laws and practices would occasionally be required to yield to national ones.

In sum, Respondent has ignored the merits and placed his eggs in an unsound basket. The petition should be granted.

I. This Case is not Moot; Respondent Can Provide the Relief Petitioner Seeks

Respondent posits that the controversy before the Court has become moot because Camden-Clark paid the extant judgment while seeking relief from it in this Court. Resp. Br. at 5-7. He is wrong.

In general, a case is moot if it presents "questions that cannot affect the rights of litigants in the case[.]" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). "The burden of demonstrating mootness is a heavy one." *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (quotation omitted). Respondent has made no such demonstration.

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[6] This point, too, merits no further discussion.

His effort rests on a partial quote of a sentence from *United States Parole Commission v. Geraghty*, 445 U.S. 388, 400 (1980): "an individual controversy is rendered moot, in the strict Art. III sense, by payment and satisfaction of a final judgment."[7] Resp. Br. at 6. This half-sentence is cited without context, and its context shows it to be utterly inapposite.

Geraghty involved whether a named *plaintiff's* pursuit of a putative class action was moot if *that named plaintiff* had already received all of the relief that he had sought. Moreover, the omitted portion of Respondent's snippet from *Geraghty* cited *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). *Roper*, too, was a putative class action, one in which the defendants had tendered to the named plaintiffs the maximum amount that each could recover. The issue presented was again whether the named plaintiffs could continue to pursue class certification. This question was of some difficulty because "[a] party who *receives all that he has sought* generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Roper*, 445 U.S. at 333 (emphasis added).[8]

Accordingly, this general rule, and Camden-Clark's payment, might well prevent *Respondent*

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[7] Respondent also cites *DeFunis v. Odegaard*, 416 U.S. 312 (1974), though only in the general sense that the federal courts have no jurisdiction over moot cases, and that some cases are moot.

[8] This Court held that neither case was moot. *Geraghty*, 445 U.S. at 404-405; *Roper*, 445 U.S. at 340.

from asserting error in the judgment in an Article III court. But this case is precisely the opposite. Petitioner has not "received all that [it] has sought"; to the contrary, Camden-Clark is very much aggrieved by the Supreme Court of Appeals' denials of review and by the judgment that its inaction has permitted to stand.

Hence, even though Camden-Clark has paid the judgment – in a simple effort to mitigate harm of which it remains aggrieved – it still may preserve its constitutional rights through this petition. If Camden-Clark is successful, and further prevails upon *de novo* review in the Supreme Court of Appeals, Petitioner will be entitled to seek repayment of the judgment from Respondent.

Such a dispute is not moot. This Court has so recognized since the Nineteenth Century. "*There can be no question* that a debtor against whom a judgment for money is recovered, may pay that judgment, and bring a writ of error to reverse it, and if reversed can recover back his money." *County of Dakota v. Glidden*, 113 U.S. 222, 224 (1885) (emphasis added). This Court has adhered to this unremarkable principle. *E.g.*, *Mancusi v. Stubbs*, 408 U.S. 204, 206 (1972) ("Petitioner's obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot this case.").

The lower federal courts have naturally followed this longstanding precedent.[9] Indeed, a leading treatise states that "[p]erhaps the easiest cases involve payment of a money judgment pending appeal. Payment and acceptance of the judgment do not moot the appeal unless the parties intended to settle." 13A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.2 (2d ed. 2007).

This case is among the "easiest." Camden-Clark is aggrieved by the judgment. It has timely sought certiorari, and its grievances can still be remedied. Respondent's mootness argument must be rejected.

II. The Supreme Court of Appeals Identified *No* Ground, Let Alone an Adequate and Independent State Ground, for Its Decision to Refuse *De Novo* Appellate Review

Respondent's second argument is that "the decision below rests upon independent and adequate state law grounds." Resp. Br. at 8. This assertion is baseless. The petition seeks review of two particular orders of the Supreme Court of Appeals of West

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[9] A very small sampling follows: *United States v. Timberland Paving & Constr. Co.*, 745 F.2d 595, 598 (9th Cir. 1984) ("The usual rule in federal courts is that satisfaction of judgment does not foreclose appeal."); *Woodson v. Chamberlain*, 317 F.2d 245, 246 (4th Cir. 1963) ("The usual rule in the federal courts is that payment of a judgment does not foreclose an appeal."); *Leader Clothing Co. v. Fidelity and Cas. Co. of New York*, 227 F.2d 574, 575 (10th Cir. 1955) ("It is a settled rule in the federal courts that the payment of a judgment does not bar an appeal therefrom where repayment may be enforced.").

Virginia refusing Camden-Clark's petitions for appeal. *See* Petition at 1, 1a-4a. Neither of these summary orders, nor a later order denying leave to renew the petitions, recites a single ground for the court's decision, much less a specific reference to an adequate, independent, and state-law ground. Indeed, this gaping absence of legal reasoning is the essence of Camden-Clark's petition.

Consequently, Respondent's hypothesizing of a potential state ground that, he speculates, might have been relied upon by the Supreme Court of Appeals gets him nowhere. "The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). Moreover, this Court "will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" *Id.* (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983)). Nothing is clear from the face of the Supreme Court of Appeals' orders except that it refused to hear an appeal on the merits.

Respondent attempts to sidestep this gaping hole in his argument by positing that the state *trial court* somehow provided the necessary adequate and

independent state ground.[10] But of course the trial court did not make the decision or commit the error complained of in the petition. The trial court is not tasked by the Fourteenth Amendment with providing *appellate* review applying the *Gore* guideposts. The trial judge simply did not, and could not have, stated an adequate and independent ground for a decision that (i) was in the future and (ii) was not his to make in the first place.

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[10] This purported ground – which Respondent ominously terms a "procedural default" with apparently limitless impact – is Respondent's assertion that Camden-Clark's motion for a new trial was untimely. Camden-Clark remains convinced that the trial court erred egregiously on this point, for reasons that are detailed in the two petitions for appeal. *See* 88a-92a, 210a-215a.

But from this Court's perspective, the point is academic, for two reasons. First, and again, the Supreme Court of Appeals did *not* affirm the trial court's holding or identify that holding as an independent ground for *its* decision not to conduct the required *de novo* review of the punitive damages award.

Second, the consequences under state law of filing no timely Rule 59 motion are not so dire as Respondent would have this Court assume. Filing a Rule 59 motion is *not* a prerequisite to petitioning for appeal. *Miller v. Triplett*, 203 W.Va. 351, 507 S.E.2d 714, 718 (1998). Instead, failure to file merely precludes the petitioner-appellant from raising "all errors *occurring during the trial*" that could have been grounds for a new trial. W.Va. R. Civ. P. 59(f) (emphasis added); Syl. pts 2, 3, *Miller*. *Appellate* review of the constitutionality of a punitive damages award therefore falls well outside the scope of W.Va. R. Civ. P. 59(f). Camden-Clark would therefore be permitted to demand such review on appeal whether it had filed a Rule 59 motion at all. *E.g.*, *Miller*, 507 S.E.2d at 719-720 (deciding on the merits two assignments of post-trial error notwithstanding lack of Rule 59 motion).

The absence of a ground cannot be an independent or adequate ground.

III. Camden-Clark Has Not Received the Process "Due"

Respondent also suggests that Camden-Clark has in fact received the process that it is due, and that somehow, despite its perfectly explicit demands for Fourteenth Amendment *de novo* appellate review, Camden-Clark fell short of a different state-law standard. These are truly straw-grasping contentions.

As the petition showed, the summary denial of discretionary review in West Virginia is legally meaningless; denial is not the Supreme Court of Appeals' expression of a view on the merits. Petition at 17-18. Respondent nonetheless alleges the existence of an unannounced state-law "exception" to this principle, which exception he limns from syllabus point 5 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1992). Resp. Br. at 21. The validity of his newfound discovery is dubious: the Supreme Court has reiterated the meaninglessness of its summary denials of petitions in cases that post-date *Garnes*, and has noted no exceptions. *E.g.*, *Triggs v. Berkeley County Bd. of Education*, 188 W.Va. 435, 425 S.E.2d 111, 118 n.9 (1992). But even if Respondent has uncovered an unwritten exception, he faces the intractable problem of the Supreme Court of Appeals' unwritten *reasoning*. Like every State, West Virginia must provide an aggrieved litigant with "exacting," *de novo* appellate review of a punitive damages award applying the *Gore* guideposts. *State Farm*, 538 U.S. at 418.

Unexplained review would give this Court – the ultimate arbiter of state compliance with the Due Process Clause – no means of knowing whether West Virginia has actually complied with its Fourteenth Amendment duties in a given case. Instead, this Court would be forced to resort to surmise and conjecture about what the state court's reasons might have been. And it is *precisely* such surmise and conjecture that Respondent features in his Brief. But this Court's precedents demand that procedures for imposing and reviewing punitive damages "ensure[] that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm*, 538 U.S. at 418 (quoting *Cooper Industries*, 532 U.S. at 436). Caprice is no more desirable an attribute of an appellate decision than a jury's. Exacting, *de novo*, appellate review *must* entail *at least* a written explanation of the Court's application of the *Gore* guideposts.

Respondent ventures even further afield in suggesting that this Court should deny the petition by deciding, *in the first instance* and *as a matter of state law*, that Camden-Clark failed to properly avail itself of state-law appellate review under syllabus points 3, 4, and 5 of *Garnes*. Resp. Br. at 17-18. But of course that is precisely what the Court's "adequate and independent" state ground doctrine forbids. *Caldwell*, 472 U.S. at 327.

Camden-Clark has shown that it sought the due process protections that it seeks here, and that

the Supreme Court of Appeals denied them. It need show no more.

IV. West Virginia is Subject to the Fourteenth Amendment

Respondent closes by urging this Court to refrain from imposing its established, constitutionally based, procedural protections on West Virginia, apparently for no more reason than that West Virginia's own law does not require those protections. Resp. Br. at 23-27. This argument reflects a profound misunderstanding of the Fourteenth Amendment and the federal system.

It is basic to our national plan that the Constitution and laws of the United States supplant any inconsistent provision of state law – even constitutional law. The Supremacy Clause singles out state judiciaries in this regard: "the Judges in every State shall be bound [by the laws of the United States], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Moreover, after the bloody upheaval of our Civil War, the Fourteenth Amendment was adopted to forbid any State from depriving any person of life, liberty, or property without due process of law. The States – West Virginia included – ratified those choices in exchange for the benefits of the federal union. This Court will do no violence to West Virginia's sovereign interests by compelling it to enforce the Fourteenth Amendment.

Of course, as to the particular due process obligation at issue, West Virginia need not forever burden itself with *de novo* appellate review of punitive damages. *Any* time that West Virginia desires to discontinue providing a certain form of due process, it need only first discontinue sanctioning the deprivation of liberty or property for which that particular form is due. West Virginia may abolish punitive damages tomorrow, and, in time, it can be free of the procedural requirements that are necessarily – *and appropriately* – imposed on States that choose to offer them. Until it takes that step, however, West Virginia must live by the same rules as all of her sister States. Those rules are stated clearly in this Court's precedents, and Respondent has not even attempted to assail them.

CONCLUSION

Camden-Clark respectfully submits that its Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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